

**IN THE COURT OF APPEALS OF IOWA**

No. 8-360 / 07-1069

Filed July 16, 2008

**IN RE THE MARRIAGE OF STEVEN LEROY KRAUSE AND DENISE MARIE KRAUSE**

**Upon the Petition of  
STEVEN LEROY KRAUSE,**  
Petitioner-Appellant/Cross-Appellee,

**And Concerning  
DENISE MARIE KRAUSE,**  
Respondent-Appellee/Cross-Appellant.

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Appeal from the Iowa District Court for Polk County, Gregory A. Hulse,  
Judge.

Husband appeals and wife cross-appeals the economic provisions of the  
court's dissolution decree. **AFFIRMED.**

Robert A. Nading II of Nading Law Firm, Ankeny, for appellant.

Alexander R. Rhoads of Babich, Goldman, Cashatt & Renzo, P.C., Des  
Moines, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

**EISENHAUER, J.**

Steven Krause appeals the district court's award of alimony and trial attorney fees to Denise Krause. Denise cross-appeals the court's allocation of retirement benefits. Both parties request appellate attorney fees. We affirm and decline to award appellate attorney fees.

**I. Background Facts and Proceedings.**

Steven and Denise Krause were married in 1988 and have one child.<sup>1</sup> They bought a home in Granger in 2001 and Denise continued to live in the home after the parties separated in May 2006. Steven is forty years of age and attended high school, but did not graduate, dropping out in the eleventh grade. For the past sixteen years Steven has worked for McAninch Corporation. He started as a laborer and has advanced to foreman. Steven's annual income, including regular bonuses, is \$82,563. Steven is always laid off in the winter months, but continues to receive income from McAninch during the layoffs.

Denise is forty-two years of age, has graduated from high school and attended Waldorf College. Her current employer provided Denise with some post-high school education and she earns \$35,579 in salary and regular bonuses as a payroll specialist. Denise's supervisor estimated \$39,000 to be the upper level of income Denise could eventually earn. Denise has worked full time since the parties were married, except for a brief maternity leave.

Steven filed a petition for dissolution on June 9, 2006, and the case was tried in February 2007. The court distributed the parties' property nearly equally,

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<sup>1</sup> The portions of the decree relating to the couple's nine-year-old daughter's custody and support have not been appealed. The court awarded joint legal custody with physical care to Denise and liberal visitation to Steven.

apportioning Steven and Denise assets totaling \$88,965 and \$88,952 respectively. The court awarded Denise \$400 alimony per month for 120 months<sup>2</sup> and \$882.72 per month for child support. Additionally, Steven was ordered to pay \$5000 toward Denise's attorney fees. Steven appeals the district court's alimony and attorney fees awards. Denise cross-appeals the court's allocation of retirement benefits. Both parties request appellate attorney fees.

## **II. Scope and Standard of Review.**

We review this equity action de novo. Iowa R. App. P. 6.4. We have a duty to examine the entire record and "adjudicate anew rights on the issues properly presented." *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the trial court's fact findings, especially regarding witness credibility, but they are not binding. Iowa R. App. P. 6.14(6)(g). The trial court's determination of credibility is given weight because it has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

## **III. Spousal Support.**

Steven argues he should not be required to pay \$400 per month in spousal support because spousal support should not be awarded to support a lifestyle the parties could not afford when they were married. He notes Denise testified she could meet day-to-day living expenses for their child and herself on her current income and child support. Additionally, Steven argues Denise could

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<sup>2</sup> At trial, Denise argued she should receive \$1400 per month for 120 months. The court's alimony award ends if Denise remarries or either party dies.

reduce her monthly mortgage payment by refinancing or by selling her current home and purchasing a smaller residence in the same school district.

Denise testified remaining in the current home would provide post-divorce stability for their daughter and spousal support would permit her to maintain the standard of living enjoyed during the marriage. The family had taken two, week-long vacations to Florida and Denise purchased a new car every two years. Denise has purchased a new vehicle and reduced her car payments by \$200 a month.

The district court found Denise's disposable monthly income from employment and child support would approximate \$3182 and noted total monthly expenses of \$3750. The court found Steven has disposable monthly income of \$4824 and noted Steven claimed total monthly expenses of \$4117, including \$626 monthly on his 401(k) loan and \$527 monthly on his boat loan. Steven has \$11,000 in proceeds remaining from the 401(k) loan. McAninch provides Steven with a car at no net expense to him. Despite this, Steven purchased an additional car and claimed \$600 in monthly expenses for this vehicle. In support of Steven's obligation to pay spousal support of \$400 per month for 120 months, the court stated:

[Steven's] boat loan payment should be substantially reduced if and when he sells the boat. Some of his other expenses are unnecessary or excessive, including, but not limited to, his cell phone, household supplies, rent, car license, car payment and gas. Further, he has money from the 401(k) loan which he had not used which could be paid back to substantially reduce his 401(k) loan payments. It appears those unnecessary or excessive expenses may be partially due to Steven providing shelter and utilities to his live-in girlfriend and her family.

The court has considered all of the factors . . . including but not limited to the fact the court did not attribute for child support purposes any additional income to [Steven] beyond his guaranteed regular and overtime pay. Steven has received additional overtime in the past on an inconsistent basis and has time during the winter when he could and has in the past worked another job.

An award of spousal support is a discretionary award, dependent upon factors in each case such as the length of the marriage, each party's age, educational level, health, earning capacity, the ability of the spouse seeking support to be self-sufficient, and the relative need for support. See Iowa Code § 598.21A(1) (Supp. 2005). We will only disturb the district court's decision if there has been a failure to do equity. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005).

We agree with the trial court's findings and conclude, under the circumstances presented in this case, including the lengthy marriage, the substantially equal property distribution, the disparate earning capacities, the ability to maintain the standard of living, Steven's claimed unnecessary expenses, and the child support payments established without considering additional winter layoff income, an award of spousal support to Denise is equitable. See *In re Marriage of Weinberger*, 507 N.W.2d 733, 735 (Iowa Ct. App. 1993) (holding where the earning disparity is great in marriages of long duration, both alimony and nearly equal property division may be appropriate"). We affirm the district court.

#### **IV. Trial Attorney Fees.**

Steven argues the district court erroneously awarded Denise attorney fees. Attorney fees are not a matter of right, but rather rest within the court's

discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We review the district court's award of attorney fees for abuse of discretion. *Id.* An award of attorney fees is based upon the respective abilities of the parties to pay and whether the fees are fair and reasonable. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997).

The parties stipulated Steven paid \$6700 of his attorney fees. Steven testified he used his 401(k) loan to pay the fees. Denise paid \$1775 to her attorney and had a remaining balance of \$11,275. The trial court ruled:

[In the division of property,] the court has included the total amount of the 401(k) retirement account without reduction of the amount of the loan. Thus, Steven has had to recapture the amount of marital funds he used to pay his attorney fees. Since the court has divided the property substantially equally, Denise has received credit for half of the \$6700 payment. The court concludes Steven should be ordered to pay \$5000 of the remaining balance of Denise's attorney fees.

We conclude the fees awarded are fair and equitable and find no abuse of discretion.

## **V. Retirement Benefits.**

Denise first argues the district court incorrectly valued her 401(k) and ESOP by including unvested portions in the final valuations. The court found the vested value of Denise's 401(k) is \$13,840 and the total value, including the non-vested portion, is \$15,419. The court concluded:

There is not a significant difference in those values [\$1580], and it would be difficult for the court to place a value for property division purposes on the non-vested portion of the plan. Denise will be 100% vested in that plan in [September] 2008. For purposes of property division, the court believes the value of the 401(k) should be \$15,419.45.

Denise next argues her ESOP with her current employer should be valued at the vested portion's valuation of \$5497. The company's human resource manager testified the ESOP is a defined contribution plan with only employer dollars being used to buy the company's stock and Denise does not make contributions. The manager further testified the plan would be 100% vested after Denise worked 1000 hours in 2007. The manager explained the ESOP's total valuation, with vested and non-vested values, was \$18,324,<sup>3</sup> based on the stock's December 2005 value. The administrator also stated a new ESOP value would be established in March 2007 based on the stock's December 2006 value. Because the company had a good year in 2006, the administrator did not expect the updated valuation to be below \$18,324. The trial court valued the ESOP at \$18,324 and awarded the entire ESOP account to Denise.

We note Iowa Code section 598.21(5)(i) instructs courts to consider the "[o]ther economic circumstances of each party, including pension benefits, vested or unvested" when dividing property. After our de novo review, we agree with the valuations utilized by the district court.

Next, Denise argues the court erred in its division of the parties' retirement accounts. Denise seeks to have us divide her pension, ESOP and 401(k) accounts according to the percentage method established in *In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996) and claims the "only equitable and fair distribution is to award each party one-half (50%) of all plan benefits." We disagree. First, Denise is ignoring the stipulation she signed. In their pretrial stipulation, Denise and Steven agreed Denise would receive her 401(k) account

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<sup>3</sup> The district court's valuation of \$18,352.59 appears to be a scrivener's error.

and her pension. The only issue for the court concerning those two plans was valuation. Denise cannot now argue a fifty percent distribution is required for those accounts.

The stipulation further provided Steven's LIUNA pension would be subject to a QDRO and the parties agreed upon the amount. However, the stipulation states the parties could not agree on either the valuation or the award of Denise's ESOP or Steven's 401(k). We have previously agreed with the trial court's valuation of Denise's ESOP and the court's valuation of Steven's 401(k) has not been appealed. Therefore, the final retirement benefits issue is whether Denise's ESOP and/or Steven's 401(k) should be subject to the fifty percent distribution Denise advocates.

The court awarded each party their entire interest in their respective retirement accounts – Denise received all of her ESOP and Steven received his entire 401(k). Because the court awarded Denise her entire interest in her ESOP account, we find no equitable reason why the QDRO fifty percent distribution Denise seeks should be utilized. *Benson* is inapplicable because the account was not divided and the court did not distribute a share to Steven as a recipient spouse. See *In re Marriage of Sullins*, 715 N.W.2d 242, 248 (Iowa 2006) (discussing methods of *dividing* pension benefits). The trial court's property division, which included every retirement plan, resulted in an equitable division of the parties' property. We see no reason to divide Steven's 401(k). See *id.* at 247 (holding "Iowa is an equitable distribution state"). Upon our de novo review,



we agree with the district court and affirm the court's retirement plan valuations and allocations.

**VI. Appellate Attorney Fees.**

Both parties request appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We consider the parties' needs, ability to pay, and the relative merits of the appeal. *Id.* Upon consideration of the foregoing factors, we decline to award appellate attorney fees. Costs on appeal are taxed one-half to each party.

**AFFIRMED.**